IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 776

UTAH PUBLIC SERVICE COMMISSION, *Appellant*,

v.

EL PASO NATURAL GAS COMPANY, ET AL., *Appellees*.

On Appeal From the United States District Court for the District of Utah

PETITION OF ARIZONA APPELLEES FOR REHEARING OR, ALTERNATIVELY, MODIFICATION OF JUDGMENT

JOHN T. MILLER, JR.
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036
Counsel for Arizona Appellees

Of Counsel:

GARY NELSON
CHARLES S. PIERSON
NICHOLAS POWELL
A. Y. HOLESAPPLE
LOUIS H. CALLISTER

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CITATIONS

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Undersigned appellees, herein collectively referred to as Arizona Appellees, respectfully petition for rehearing or, alternatively, for modification of the Court's judgment issued herein on June 16, 1969 as more particularly specified below.

I.

ADVERSE JUDGMENT ISSUED WITHOUT NOTICE OR HEARING

The State of Arizona appears here on behalf of The Arizona Corporation Commission, a government body established by law and regulating, *inter alia*, the distribution of natural gas service by public utilities in the State of Arizona.

Arizona Public Service Company and Tucson Gas & Electric Company are public utilities operating solely within the State of Arizona under regulation of The Arizona Corporation Commission. Each obtains all of its natural gas supplies from El Paso Natural Gas Company (El Paso). Each will remain a customer of El Paso after divestiture takes place.

None of the Arizona Appellees was a party to the unlawful merger which is the subject of this proceeding.

Arizona Appellees qualified as intervenors as of right in the proceedings below under *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967). They intervened, became parties and participated actively in every phase of the protracted proceedings before District Judge Hatfield Chilson. Their interest in the divestiture which the Court has ordered stems from the fact that El Paso is a "natural-gas company" regulated by the Federal Power Commission under the Natural Gas Act. El Paso's rates for natural gas service are designed to earn its cost of service. When El Paso's cost of service rises, the Company is entitled to file for and collect offsetting higher rates. See *United Gas Co.* v. *Memphis Gas Div.*, 358 U.S. 103 (1958), *rehearing den.* 358 U.S. 942 (1959); *El Paso*

Natural Gas Co. v. *Federal Power Commission,* 281 F. 2d 567 (5th Cir. 1960), *cert. den.* 366 U.S. 912 (1961), *rehearing den.* 366 U.S. 955 (1961).

Certain of the divestiture proposals presented to Judge Chilson might have punished El Paso, but they most certainly would have increased El Paso's cost of service and thereby penalized innocent gas consumers through higher gas costs. Arizona Appellees vigorously opposed such proposals. The relevant facts were developed on the record and Arizona Appellees argued to the District Court that such injury to consumers in Arizona was unjust, unequitable and unnecessary.

Among the propositions opposed by Arizona Appellees in this manner were a demand for the allocation of substantial additional volumes of natural gas to New Company and a proposal calling for the cash sale by El Paso of its equity interest in the divested properties.

The decree of Judge Chilson did not unduly injure Arizona Appellees or the consumers they protect and serve. The District Court did not sanction a cash sale. The Court allocated more gas reserves to New Company than Arizona Appellees believed required by *Cascade* or by basic principles of equity; but the need for restoring certainty and stability to the natural gas public utility business in the western states through an early end to this litigation seemed sufficiently demanding to warrant suffering this much adverse effect of the decree in silence.

On April 21, 1969, Counsel for Arizona Appellees was advised by the Clerk of this Court as follows:

> "The Court today entered the following order in the above case:
>
> "The motion of the appellant to dismiss the appeal under Rule 60 and the motion of Mr. William

M. Bennett for a hearing are set for oral argument on April 29, 1969. The Solicitor General is invited to file a brief and present oral argument if he so desires. Mr. Justice Harlan and Mr. Justice Stewart dissent, believing that the action taken by the Court abuses its own processes. See Rule 60. Mr. Justice White, Mr. Justice Fortas and Mr. Justice Marshall took no part in the consideration or decision of this matter."

Neither of the matters specified in this order directly concerned Arizona Appellees. They were not advised that this Court would use the occasion of the April 29, 1969 argument to raise and dispose of vital and complicated issues of gas reserves and mode of payment for divested assets which had warranted Arizona Appellees' intervention and constant attendance in the District Court proceedings. Assuming that Utah Public Service Commission's Jurisdictional Statement did present "the question whether the decree entered below satisfied" this Court's mandate, *Utah Commission* v. *El Paso Natural Gas Co.*, U.S. (1969) (slip op. p. 3.), this Court's notice of hearing put no one on notice that an argument on Utah's motion to dismiss the Jurisdictional Statement would serve as a vehicle for disposing of the merits of the contentions made in the Jurisdictional Statement. Moreover, Utah's Jurisdictional Statement did not challenge the allocation of gas reserves made by Judge Chilson nor did it insist on a cash sale of the divested assets.

The result is grim. Arizona Appellees participated in the Court below as intervenors *as of right* under *Cascade* and Rule 24(a) of the Federal Rules of Civil Procedure. They successfully defended their rights and interests in that forum. They entered appearances as Appellees in this Court and awaited the time when

the appellant might attack those portions of the decree of the District Court affecting Arizona Appellees' interests. But the attack never came from Appellant Utah Commission. Instead, it came in the form of a *fait accompli,* a judgment, of this Court. Disarmed by a lack of notice, Arizona Appellees find themselves adversely affected by the Court's June 16, 1969, judgment without having been afforded an opportunity to brief and argue the merits of the substantive changes in the *Cascade* guidelines ordered by this Court.

II.

FURTHER ALLOCATION OF GAS RESERVES IS CONTRARY TO PUBLIC INTEREST

This Court summarily rejected the allocation of gas reserves ordered by the District Court despite the fact that the decree contains the "meticulous findings made in light of the competitive requirements" demanded by *Cascade,* (386 U.S. at 137) and is based upon gas reserve and market evidence developed in the course of a lengthy hearing, analyzed and evaluated by detailed briefs and oral argument. Although this Court seems to have done little more than to restate a portion of its mandate in *Cascade,* the District Court can be expected on remand to read the June 16 judgment as requiring the allocation of a larger volume of gas reserves to New Company, particularly from the San Juan Basin.

The gas reserves which this Court has ordered be allocated do not come from a bank of fresh uncommitted supplies. Divestiture involves a surgical act of separating system gas reserves which for over ten years have supported long-term service contracts with a large number of public utilities and other customers

on both the pipeline system to be divested by El Paso (northwest division) and the system it will retain (southern division). Both New Company and El Paso must survive the operation, able to continue present service without risk of interruption or higher cost to consumers. These gas reserves provide the lifeblood of El Paso's system. They stand behind the 20-year contracts which El Paso has executed with its customers and the service which the Federal Power Commission has authorized El Paso to render. In this connection, El Paso renders no service which has not been authorized by the FPC.

1. *Cascade* provided guidelines for the District Court in allocating gas reserves:

> "The gas reserves granted the New Company must be no less in relation to present existing reserves than Pacific Northwest had when it was independent; and the new gas reserves developed since the merger must be equitably divided between El Paso and the New Company. * * *" (386 U.S. at 136-7)

The District Court construed these standards in a manner very favorable to New Company. The lower Court's decree allocated to New Company all of the gas reserves it had brought into the merger plus fifty percent of the net additions to gas reserves acquired by the total system since 1957. Considering the fact that the northwest division serves a market about one-fourth the size of that served by the southern division, New Company's share of the reserves acquired since 1957 is most generous. (See El Paso Exhibit 1, tab 6)

2. If the new guideline set out in the June 16, 1969, judgment should allocate to New Company substantial additional gas reserves over and above those involved

in the decree here on review, innocent gas consumers on the southern division in Arizona and elsewhere will be injured through interruptions of gas supplies and higher rates, and competition in the California market will be reduced.[1]

a.) This Court's order would leave El Paso with an inadequate gas supply. The Company would be unable to provide the service to public utility customers on its southern division which they are now receiving under authorizations issued by the Federal Power Commission. (T. 739, 1382) As El Paso's rates are based on its cost of service, El Paso itself might suffer relatively slight injury if it cannot continue present deliveries. Ordinarily it would be allowed the opportunity to earn a full return on its partially idled plant. But El Paso's southern division public utility customers would suffer the consequences in the form of reduced or interrupted gas service and higher rates. This result is quite inconsistent with the view taken by this Court in assessing the legality of a public utility's long-term fuel supply contract under the Clayton Act in *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 334 (1961):

> "* * * in the case of public utilities the assurance of a steady and ample supply of fuel is necessary

[1] The arguments which immediately follow are based primarily on testimony before the District Court at Tr. 739-758. This testimony was developed in light of a suggestion that the District Court order El Paso to divest additional gas reserves capable of delivering 375,000 Mcf per day to the California market. The testimony is relevant here because the District Court actually ordered El Paso to divest 100,000 Mcf per day more than was proposed at the time the evidence was elicited. This Court's June 16 judgment would increase again the divested volume.

in the public interest. Otherwise consumers are left unprotected against service failures owing to shutdowns; and increasingly unjustified costs might result in more burdensome rate structures eventually to be reflected in the consumer's bill. The compelling validity of such considerations has been recognized fully in the natural gas public utility field. * * *"

b.) El Paso has no substitute or surplus gas supplies readily available to replace any substantial additional divestiture ordered by the Court below. (T. 740) Moreover, the divestiture decree will make it more difficult for El Paso to find replacement gas supplies because El Paso is to be cut off from access to Canadian supplies in British Columbia, the only developed gas reserves identified on the record as readily available to serve Western markets. (See T. 136, 667, 1045, 8744-45)

c.) Were El Paso to sign up with American producers for replacement gas supplies, it might seriously increase El Paso's present large investment in prepaid gas, which is a substantial burden on El Paso and its public utility customers. (T. 742-3) This investment, representing expenditures made by El Paso to producers for gas volumes which it was unable to take into its system but which it was contractually obliged to pay for, was estimated at $53,000,000 in 1968. (T. 1668) Each dollar of that investment costs El Paso's public utility customers about 12 cents per annum. (T. 746)

d.) The Permian and Delaware Basins of West Texas are the only apparent sources of replacement gas supplies available to El Paso which were identified on the record. Were El Paso able to purchase replacement gas volumes from those areas, El Paso's cost of rendering service to its public utility

customers on its southern division would increase because

(i) Existing pipelines connecting the San Juan Basin in New Mexico with the southern division pipeline system would become partially idled as a result of increasing the volume of gas allocated to New Company.[2] As the fixed charges on those pipelines would remain stable, El Paso's cost of transporting gas through those lines would increase as throughput declined. (T. 739)

(ii) The wellhead price of new gas well gas in Permian Basin is 16.59¢/Mcf (at 14.73 psia inclusive of tax reimbursement), as compared to the San Juan initial price of 12.74¢/Mcf (at 14.73 psia inclusive of tax reimbursement).[3] In other words, each Mcf of replacement gas could cost El Paso (and, consequently, its public utility customers) at the wellhead 3.85¢ or 30 percent more than the initial price of gas in the San Juan Basin.

(iii) El Paso would be obliged to construct new pipelines to transport the replacement gas supplies from the Permian and Delaware Basins several

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[2] Ironically, the Utah Commission recognized that the San Juan Basin did not contain sufficient gas reserves to effect this Court's purpose:

> "Neither the San Juan Basin nor the Anadarko Basin from which New Company and CIG, respectively, now draw their major source of supply offer the opportunity for the development of substantial additional reserves and both companies must look to Wyoming, which is an area of tremendous potential to develop the futur reserves that their systems require." Jurisdictional Statement, pp. 29-30.

[3] See Order No. 381 issued May 12, 1969 in FPC Docket No. R-358, 96 *Fed. Reg.* 7904 (1969).

hundred miles to the Arizona and California markets. El Paso may not be injured if it must build new pipelines and transport gas from more distant and more expensive replacement sources of supply in order to maintain service to existing markets, because it can raise rates to cover higher gas purchase costs and fixed and operating charges on new pipelines. But El Paso's public utility customers must bear the burden by paying higher rates for the privilege of assuring the maintenance of present natural gas service.

e.) El Paso would be disabled from competing in the California market for several years if it were to lose substantial additional volumes of natural gas reserves. (T. 754-5). First, the Company must rebuild its gas reserves to the point where it can maintain the service already authorized by FPC orders. Only then would it be in a position to acquire sufficient reserves to support a competitive project. All of this would take years to effect. Meanwhile, New Company would have no competition from El Paso in serving the California market. Competition "is for the new increments of demand that may emerge with an expanding population and with an expanding industrial or household use of gas." *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 660 (1964). Contrary to its apparent intent, this Court's June 16 judgment serves to eliminate El Paso as "a competitive force in California." *Utah Commission* v. *El Paso Natural Gas Co., supra* (slip op. p. 5).

f.) A substantial additional reduction in the level of El Paso's gas reserves may create problems with the Trustee under El Paso's pipeline mortgage indenture,

accelerating sinking fund payments and limiting the financing of new pipelines with mortgage bonds. (T. 749-50) At the least, this would increase the cost of financing expanded pipeline service on El Paso's southern division. At worst, it would render El Paso unable to enlarge its pipeline system further.

g.) This Court's pointed reference to gas reserves in the San Juan Basin brings up another competitive problem. If New Company is saddled with surplus gas reserves on the southern end of its pipeline system (and this Court's new judgment appears to intend such a result), it would amount to an affirmative determination by this Court of the following questions which the Court obviously did not consider:

(i) Is New Company to build its competitive pipeline to California from gas sources only in the San Juan Basin in New Mexico?

(ii) Is New Company to be deprived of the freedom to decide to build a competitive gas pipeline to California from newly developed gas fields in the Rocky Mountain area, particularly Wyoming, the area deemed most important by the Utah Commission in its Jurisdictional Statement? (See Jurisdictional Statement p. 11)

(iii) Is New Company to be denied the opportunity to accept the offers of Westcoast Transmission Company, Limited to supply vast volumes of gas for the California market from sources in British Columbia (Tr. 136, El Paso Exhibit 46), the Yukon and Northwest Territories and the Northern Slope of Alaska? Pacific Northwest Pipeline Corp. was seeking to compete in the California market with gas supplies from Canada just

prior to the unlawful merger;[4] and Canada provides the most readily available gas supplies for a competitive California project today. (See the proposal of Westcoast to bring in gas supplies from the Yukon and Northwest Territories and the Northern Slope reported in *The Wall Street Journal* on June 24, 1969, p. 5.)

(iv) Is Pacific Gas Transmission Company to be allowed to enjoy a monopoly in the supply of gas from Canada to the California market of its parent Pacific Gas & Electric Company[5] because New Company is burdened with the necessity of finding a market for surplus gas reserves located a thousand miles south of the Canadian supply area?

There is no readily apparent reason why the allocation of gas reserves should be effected in a manner giving present and future consumers on New Company's system an advantage at the expense of present consumers on El Paso's southern division. The District Court is sitting as a court of equity. "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides determinations of courts of equity." *Meredith* v. *Winter Haven,* 320 U.S. 228, 235 (1943). Equity is the instrument for "nice adjustment and reconcilia-

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[4] *United States* v. *El Paso Natural Gas Co.,* 376 U.S. 651, 660 (1964).

[5] See *California Gas Producers Assn.* v. *Federal Power Commission,* 383 F. 2d 645 (9th Cir. 1967). "[I]n California there are only two significant wholesale purchasers—Pacific Gas & Electric in the north and the Southern Companies in the south." *United States* v. *El Paso Natural Gas Co.,* 376 U.S. at 660.

tion between the public interest and private needs as well as between competing private claims." *Hecht Co.* v. *Bowles,* 321 U.S. 321, 329-30 (1944).

This Court should require the formulation of a decree which, while effectively eliminating the antitrust violation and restoring competitive conditions, at the same time effects "as little injury as possible to the interest of the general public". *United States* v. *American Tobacco Co.,* 221 U.S. 106, 185 (1911). "Divestiture is itself an equitable remedy designed to protect the public interest." *United States* v. *du Pont & Co.,* 366 U.S. 316, 326 (1961).

The public whose interest is to be considered and protected surely includes gas consumers living in Arizona as much as it includes those in California. The gas consumers of Arizona are guilty of no wrongdoing here. They have been diligent in protecting their rights. They are entitled to equal treatment with other gas consuming areas affected by the divestiture decree. "And the Equity is equal between persons, who have been equally innocent, and equally diligent." Story, *Commentaries on Equity Jurisprudence* 75 (2d ed. 1839).

III.

CASH SALE OF ASSETS IS CONTRARY TO PUBLIC INTEREST

This Court has instructed the District Court to dispose of the divested properties by a cash sale, citing *United States* v. *du Pont & Co.,* 366 U.S. 316 (1961). "Only a cash sale will satisfy the rudiments of complete divestiture." (slip op. p. 7.) The fact that the proposed mode of divestiture would reduce El Paso's income tax burden was rejected as a justification. "We

have emphasized that the pinch on private interests is not relevant to fashioning an antitrust decree, as *the public interest* is our sole concern." (*Ibid.*, emphasis supplied.)

1. A divestiture of El Paso's assets through a cash sale is injurious to the public interest, a fact that might have been developed had this Court given notice that the issue was to be heard and decided. Unlike du Pont, El Paso is a regulated company serving public utilities under long-term contracts.[6] Provisions of a remedial decree which increase El Paso's cost of providing natural gas service simply serve to penalize innocent public utility customers in the form of higher rates. This result must be avoided. See *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 334 (1961).

Since 1962, when this Court nullified Federal Power Commission approval of El Paso's acquisition of Pacific Northwest Pipeline Corp. (*California* v. *Federal Power Commission*, 369 U.S. 482 (1962)), El Paso has operated its northwest division under temporary certificates of public convenience and necessity. As a consequence, the Company has not been able to finance over $60,000,000 in pipeline additions to the northwest division with mortgage bonds. (T. 1663-4, 1706) Instead it has had to raise the necessary funds through the sale of debentures bearing interest rates higher than that being paid on the mortgage bonds.

Under the cash sale ordered by this Court, El Paso must deposit all of the proceeds of the sale with the Trustee in accordance with the requirements of the

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[6] There is another fundamental distinction. In *duPont*, this Court was concerned with the disposition of the stock of General Motors Corporation and not with its assets. 366 U.S. 316 (1961).

mortgage indenture. (T. 759) This means that El Paso's debentures will remain outstanding after divestiture as part of El Paso's capitalization, and the rates charged to the public utility customers on the southern division will reflect the higher interest rate of those debentures issued for the benefit of customers on the northwest division pipeline system being divested.

Southern division customers are injured by a cash sale in another way. El Paso will divest the northwest division properties which produce substantial revenues, but the Company will not experience any reduction in its annual sinking fund obligations under the indentures governing its mortgage bonds and debentures. In other words, the decline in El Paso's revenues will not be offset by a corresponding decline in current cash flow requirements attributable to the debt incurred to finance the original acquisition and expansion of the divested properties. (T. 893) To the extent that the depreciation allowance on the properties remaining in El Paso's hands does not provide sufficient funds to meet the sinking fund requirements of this large amount of debt, El Paso's credit (and, therefore, its ability to finance future pipeline expansions on its southern division) will be adversely affected.

In short, a cash sale of the divested assets provides neither an equitable nor a clean-cut solution. It promises to leave a residue of burdensome costs and cash flow complications which could increase the cost of gas to public utilities on the southern division of El Paso and jeopardize El Paso's capability to finance the construction programs needed to meet its southern division market requirements in the future.

A crippled El Paso might appear an attractive prospect to those who take the view that the purpose of a remedy in this case is to punish El Paso for violating the federal antitrust law. But that result would constitute a grievous blow to the public utilities and gas consumers looking to El Paso as their source of natural gas supplies.

2. Effective divestiture with a dissolution "of the intercorporate community of interest which we find to violate the law" *du Pont, supra* at 331, can be effected without a cash sale of the assets. This could be accomplished by transferring the divested assets to New Company in exchange for its common stock and the assumption of approximately $170 million of El Paso's indebtedness, followed by a spin-off by El Paso of the New Company stock to El Paso's 120,000 shareholders. El Paso would receive neither earnings nor profit on the transaction.

A spin-off is an appropriate device of divestiture. It was successfully employed in effecting dissolution of the "intercorporate community of interest" in the famous *Standard Oil*[7] and *American Tobacco*[8] cases.

A cash sale of the divested assets may involve the payment by El Paso of up to $50 million in taxes. This possibility is deemed by this Court "not relevant to fashioning an antitrust decree". (Slip op. p. 7)

We respectfully submit that where, as here, the Court has available to it effective modes of divestiture which have insignificant tax consequences, the deliberate choice of a remedy in a civil antitrust suit brought by

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[7] *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911).

[8] *United States* v. *American Tobacco Co.*, 221 U.S. 106 (1911).

the United States requiring payment of substantial taxes represents an award to the plaintiff which was neither sought by the United States in its complaint nor justified by any evidence of record.

The antitrust laws specify in detail the remedies available to the Government in enforcing them. The "Court's task is finished when it gives effect to the purposes of the law, evidenced by the various remedies it affords for different situations." *United States* v. *Cooper Corp.*, 312 U.S. 600, 608 (1941). In *Cooper*, the United States was not permitted to maintain an action for treble damages under section 7 of the Sherman Act[9] because that remedy was not specified in the statute. Legislation was required to remedy the statutory deficiency. The case at hand is analagous.

There is no provision in the present antitrust laws permitting the award of large sums to the Government where the Government neither seeks such relief as part of a damage claim nor justifies the award in terms of injury suffered. It is not as if the heavy tax payments are the unintended consequence of the only available remedy. With alternative effective divestiture remedies available, the choice of the cash sale represents an improper attempt to enlarge the statutory remedies made available by Congress.

IV.

OTHER DETERMINATIONS NOT CHALLENGED IN THIS COURT SHOULD NOT BE REVERSED

The District Court had before it a large number of issues relating to the division of assets on divestiture. Nine different applicants who desired to purchase the

[9] Act of July 2, 1890, c. 647, 26 Stat. 209, 210.

divested properties were heard. Weeks of trial were spent in analyzing, challenging and rebutting the various proposals. Although the case was diligently moved along, two years have elapsed since *Cascade*.

The District Court decided many issues which no one saw fit to challenge in this Court. They are generally identified in the table of contents of Judge Chilson's Opinion. Among the matters uncontroverted here are the list of physical assets, gas sales agreements and investments to be divested; and the appropriate manner of disposing of the West Coast and Northwest Production Company stock, tax loss carryover, Mobil notes and inter-company and other contracts.

The summary vacation of the District Court's judgment throws all of this accomplishment into the discard. Everything is once more open to challenge. The proceeding below, which encompassed over 11,000 pages of transcript, has been nullified. Such a waste of effort represents a clear frustration of this Court's direction to the District Court five years ago "to order divestiture without delay." *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 662 (1964).

If this Court is to remand this case (a measure which Arizona Appellees neither seek nor desire), its judgment ought to husband what has not been challenged and what may be preserved of the lower Court's decree. The District Court should be encouraged to utilize the existing voluminous record, to the extent possible, in redeciding any specific issue reopened by the remand.

V.

A QUORUM PROBLEM EXISTS

A quorum of six justices participated in the June 16, 1969 decision. 28 U.S.C. § 1. Since then, Mr. Chief Justice Warren has retired from the Court, leaving only five justices presently in office who considered themselves qualified to participate in the determination of this case.

Unless Mr. Chief Justice Burger, or the yet-to-be-appointed justice who is to fill the vacancy created by the resignation of Mr. Justice Fortas, is willing to participate in the consideration of this petition for rehearing, a quorum of qualified justices will not exist. In which event, the case should be resolved in accordance with the statutory provision for the disposition of cases in which a quorum is lacking. 28 U.S.C. § 2109.

This case began with the filing of a civil antitrust suit by the United States in July 1957. This was subsequent to the time when Mr. Chief Justice Burger was an Assistant Attorney General. The United States Court of Appeals for the District of Columbia Circuit did review the Federal Power Commission's approval of El Paso's acquisition of Pacific Northwest Pipeline Corporation in 1961 when Mr. Chief Justice Burger was a member of that Court, but he did not participate on the panel which heard and decided the case. *California* v. *Federal Power Commission,* 296 F.2d 348 (D.C. Cir. 1961), *rev'd* 369 U.S. 482 (1962).

If this Court cannot assemble a quorum to hear this petition for rehearing, the Chief Justice may return

the matter to the United States Court of Appeals for the Tenth Circuit for decision. Or, if a majority of the qualified justices are of the opinion that the case cannot be heard and determined at the next ensuing term, the Court shall enter its order affirming the judgment of the District Court. 28 U.S.C. § 2109.

CONCLUSION

This Petition for Rehearing, directed specifically to the questions of the allocation of gas reserves and the permissible modes of payment for the divested properties, should be granted.

If rehearing is denied, this Court should, as a minimal alternative, amend its judgment of June 16, 1969 to

1. Affirm the District Court's decision on the allocation of gas reserves between El Paso and New Company;

2. Affirm the District Court on all other aspects of its decree which were not challenged before this Court;

3. Authorize the District Court to adopt any mode of payment for the divested properties which, while quickly and effectively dissolving "the intercorporate community of interest", will minimize the adverse consequences of the divestment on gas consumers on both the system being divested and on El Paso's southern division; and

4. Instruct the District Court to utilize to the maximum extent possible, the present record in the case in

determining those issues on which this Court specifically overrules the District Court.

Respectfully submitted,

STATE OF ARIZONA, ex rel.
THE ARIZONA CORPORATION
COMMISSION
ARIZONA PUBLIC SERVICE
COMPANY
TUCSON GAS & ELECTRIC
COMPANY

By JOHN T. MILLER, JR.
1001 Connecticut
Avenue, N.W.
Washington, D.C. 20036
Their Attorney

Of Counsel:

HONORABLE GARY NELSON
The Attorney General
CHARLES S. PIERSON
Assistant Attorney General
State of Arizona

NICHOLAS H. POWELL, ESQ.
SNELL & WILMER
Arizona Public Service
Company

A. Y. HOLESAPPLE, ESQ.
HOLESAPPLE, CONNER, JONES,
MCFALL & JOHNSON
Tucson Gas & Electric
Company

LOUIS H. CALLISTER, ESQ.
CALLISTER, KESLER & CALLISTER
Arizona Public Service
Company
Tucson Gas & Electric Company

CERTIFICATE OF COUNSEL

I certify that this petition is presented in good faith and not for delay.

JOHN T. MILLER, JR.

July 1969